IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 22-765

**MONONGALIA COUNTY COMMISSION,
MONONGALIA COUNTY SHERIFF'S DEPARTMENT,
SHERIFF PERRY PALMER, in his official capacity as Sheriff
Of Monongalia County, and JOHN DOE DEPUTY,**

Petitioners,

VS.

**AMANDA STEWART, individually and/or in her capacity as
Administratrix of the Estate of John D. Stewart, Jr.,**

Respondent.

RESPONDENT'S BRIEF AND CROSS-ASSIGNMENT OF ERROR

**John R. Angotti, Esquire (W.Va. Bar #5068)
David J. Straface, Esquire (W.Va. Bar #3634)
Chad C. Groome, Esquire (W.Va. Bar #9810)
Angotti & Straface, L.C.
274 Spruce Street
Morgantown, WV 26505
(304) 292-4381 – P
(304) 292-7775 – F
johnangotti@angottistrafacelaw.com
djstraface@angottistrafacelaw.com
chadgroome@angottistrafacelaw.com
*Of Counsel for Respondent, Amanda Stewart***

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I. RESPONDENT'S CROSS-ASSIGNMENT OF ERROR

1. The Circuit Court of Monongalia County (J. Gaujot) erred when it held that the plaintiff could not pursue a claim against the Monongalia County Commission, beyond a claim for vicarious liability, insofar as it found the County to be immune under the ***West Virginia Governmental Tort Claims and Insurance Reform Act,*** **W.Va. Code § 29–12A–5(a)(5),** pursuant to is misapplication of **Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016).**

II. STATEMENT OF THE CASE

The instant appeal regards a series of *Orders* of the Circuit Court of Monongalia County (J. Gaujot) substantially denying several *Motions to Dismiss* filed by Petitioners (and defendants hereinbelow), Monongalia County Commission d/b/a Monongalia County Sheriff's Department and John Doe Deputy, regarding defenses of immunity. *(J.A._001,0122).* The matter stems from an officer-involved shooting on April 17, 2019, wherein John Doe Deputy shot and killed decedent, John D. Stewart, during a civil investigation because he alleges to have felt threatened by Mr. Stewart due to his possession of an unopened pen knife. As the allegations of the *Amended Complaint* assert, that unopened pen knife was in Mr. Stewart's pocket at the time of the shooting. *(J.A._0113).* Petitioner John Doe Deputy's claimed rendition of events surrounding the shooting do not align with the objective evidence. *Id.* Moreover, the Respondents failed to preserve body cam footage of this shooting and/or the Petitioner, John Doe Deputy, otherwise avoided turning on his body cam prior to escalating the situation to violence with Mr. Stewart and executing him. *(J.A._0112).*

The Respondent, Amanda F. Stewart, is the biological daughter of the decedent, John D. Stewart, Jr., and is the duly appointed Administratrix of his Estate. *(J.A._0106).* The decedent,

John D. Stewart, Jr., resided at 4817 Mason Dixon Highway, Fairview, Monongalia County, West Virginia. (*J.A._0107).* The decedent was purchasing the property at 4817 Mason Dixon Highway, Fairview, Monongalia County, West Virginia, where he lived, from his sister, Jessica Stewart, and was making monthly payments toward its purchase. *Id.*

Pursuant to the allegations of the *Amended Complaint*, on April 17, 2019, the decedent, John D. Stewart, Jr., had a dispute with his sister, Jessica Stewart, over his living arrangements at 4817 Mason Dixon Highway home and the status of his monthly payments. (*J.A._0108).* As a result of this dispute, Jessica Stewart contacted 911 and advised it of a domestic dispute regarding her and the decedent, John D. Stewart, Jr. *Id.*

Petitioner, John Doe Deputy, arrived at the 4817 Mason Dixon Highway property. *Id.*[1] Upon arrival, Jessica Stewart instructed Petitioner, John Doe Deputy, that she had been arguing with her brother and decedent, John D. Stewart, Jr., and alleged that he had not been making his monthly payments to her for the 4817 Mason Dixon Highway property. *Id.* As such, she wanted to evict him. Petitioner, John Doe Deputy, instructed Jessica Stewart that she would need to file an eviction proceeding to remove the defendant, John D. Stewart, from the property. *Id.*

The decedent, John D. Stewart, Jr., was known by Jessica Stewart and/or others to suffer from some degree of mental illness. *Id.* Jessica Stewart instructed the Petitioner, John Doe Deputy, that the decedent threatened her and showed the Petitioner, John Doe Deputy, a video from her phone allegedly evincing their dispute. *Id.* The Petitioner, John Doe Deputy, was obviously not concerned by the video as he radioed dispatch and called off any backup insofar as he did not perceive the situation as a criminal matter or a threat, but a civil matter. *Id.* As such, Petitioner,

[1] It should be noted that all factual references in the *Amended Complaint*, with the exception of allegations regarding contrary facts, come from rendition of events set forth by the Deputy in the investigatory materials. The Deputy shot the only other known eyewitness to the shooting and did so without creating or preserving body cam footage. As such, those facts must be taken with a grain of salt, insofar as they are self-serving to the officer.

John Doe Deputy, advised Jessica Stewart to take her children with her and travel with him to the police station to complete mental hygiene petition paperwork on decedent, John D. Stewart, Jr., if she felt that was appropriate. (*J.A._0109).* Jessica Stewart agreed to travel with the Deputy, to complete a mental hygiene petition. *Id.*

Jessica Stewart instructed her father, John D. Stewart, Sr., who was also near the scene, to go into the home and speak with the decedent, John D. Stewart, Jr. *Id.* Petitioner, John Doe Deputy, advised against this. *Id.* The decedent, John D. Stewart, Jr., and his father, John D. Stewart, Sr., came out of the home arguing and the father came to the area where Ms. Stewart and Petitioner, John Doe Deputy, were located. *Id.* The Petitioner, John Doe Deputy, entered his cruiser and radioed dispatch. *Id.* He was advised that the decedent, John D. Stewart, Jr., had an active warrant. *Id.* The Petitioner, John Doe Deputy, did not inquire into the nature of the alleged warrant. *Id.* However, at all times material and relevant, the decedent, John D. Stewart, Jr., did not have an active warrant for his arrest. *Id.*

The decedent, John D. Stewart, Jr., approached the car door for the cruiser within which the Petitioner, John Doe Deputy, was seated. *Id.* The Petitioner, John Doe Deputy, instructed the decedent, John D. Stewart, Jr., not to come any closer and to back off. *Id.* The Petitioner, John Doe Deputy, did not feel physically threatened by the decedent, John D. Stewart, Jr., and exited the front seat of his cruiser. *Id.* The Petitioner, John Doe Deputy, pushed his door open and pushed the decedent, John D. Stewart, Jr., back telling him to put his hands behind his back. (*J.A._0110).* Upon information and belief, the Petitioner, John Doe Deputy, escalated the situation with Mr. Stewart and became hostile toward the decedent, John D. Stewart, Jr. *Id.* Upon further information and belief, the Petitioner, John Doe Deputy, asserted that the decedent, John D. Stewart, Jr., put his fists up into a fighting stance. *Id.* The Petitioner, John Doe Deputy, asserted that the decedent,

John D. Stewart, Jr., told the defendant "no" when asked to place his hands behind his back. *Id.* However, at no time did the Petitioner, John Doe Deputy, have probable cause to arrest the decedent. *Id.*

Upon information and belief, the Petitioner, John Doe Deputy, pulled out his taser and told the decedent, John D. Stewart, Jr., to place his hands behind his back again. *Id.* The Petitioner, John Doe Deputy, asserted that the decedent, John D. Stewart, Jr., told the Petitioner "no" again. *Id.* The Petitioner, John Doe Deputy, was not physically threatened or intimidated by the decedent, John D. Stewart, Jr. *Id.* As such, he placed the taser back in its holster. *Id.* The Petitioner, John Doe Deputy, reached to grab decedent John D. Stewart, Jr.'s wrist and the decedent pulled away. *Id.* Upon information and belief, the decedent, John D. Stewart, Jr., turned to run back toward his home. *Id.* Upon information and belief, the Petitioner, John Doe Deputy, did not retreat or call for back up. *Id.* Instead, he sprayed pepper spray in the direction of the decedent, John D. Stewart, Jr., and missed him. *Id.* As the decedent, John D. Stewart, Jr., was running toward his home, the Petitioner, John Doe Deputy, chased him. *(J.A._0111).* The Petitioner, John Doe Deputy, did not perceive the decedent, John D. Stewart, Jr., as a threat insofar as he continued to pursue him. *Id.* Upon information and belief, the Petitioner, John Doe Deputy, alleges that the decedent, John D. Stewart, Jr., reached into his left pocket while looking over his right shoulder stating that he had a knife. *Id.* The knife he was referring to was a small pocket or pen knife that was unopened. *Id.* The decedent, John D. Stewart, Jr., reached his porch near his door. *Id.* At the time that decedent, John D. Stewart, Jr. was standing on his porch, the Petitioner, John Doe Deputy, was standing on the ground approximately 15 to 22 feet away. *Id.* Upon information and belief, the Petitioner, John Doe Deputy, asserted that the decedent, John D. Stewart, Jr., spun around on his porch and that the Petitioner believed that the decedent was going to open his small pocket and/or pen knife. *Id.*

The Petitioner, John Doe Deputy, while approximately 15 to 22 feet away, did open fire upon the decedent, John D. Stewart, Jr., striking him with two (2) shots to his torso and fatally wounding him. *Id.* At the time he fatally shot the decedent, John D. Stewart, Jr., the Petitioner, John Doe Deputy, was also separated from decedent, John D. Stewart, Jr., by a porch, porch railing, and/or wooden steps. *Id.; (J.A._0222-0225).* At the time that Petitioner, John Doe Deputy, fired the fatal shots, the decedent, John D. Stewart, Jr., had only an unopened, pocket and/or pen knife in his pocket and posed no physical threat to him. *(J.A._0112).* At all times material and relevant, the Petitioner, John Doe Deputy, had alternative non-lethal options for use in his interaction with the decedent, John D. Stewart, Jr., on the aforesaid date, such as, but not limited to taser, pepper spray, retreat, de escalation, protective cover, wait for additional officer assistance, etc. *Id.; (J.A._0222-0225).* The Petitioner, John Doe Deputy, used deadly force when deadly force was not authorized and/or justified by the circumstances. *Id.*

The acts and/or omissions of the Petitioners, John Doe Deputy and/or Monongalia County Commission, are alleged to evince a guilty conscience and/or that deadly force was not authorized and/or justified by the circumstances. *(J.A._0112).* The Petitioners, John Doe Deputy and/or the Monongalia County Commission, failed to preserve the body cam footage of Petitioner, John Doe Deputy's use of deadly force against the decedent, John D. Stewart, Jr. *Id.* Alternatively, the Petitioner, John Doe Deputy, failed to or refused to record his use of deadly force against the decedent, John D. Stewart, Jr. per department policy. *Id; (J.A._0222-0225, 0235-0258)*

The Petitioners, John Doe Deputy and/or the Monongalia County Commission, have attempted to assert that deadly force was used against the decedent, John D. Stewart, Jr., due to his possession of and/or the threat posed by his possession of a small and unopened, pocket or pen knife. *(J.A._0113).* The Petitioners, John Doe Deputy and/or the Monongalia County Commission,

claimed in the underlying investigation of the decedent's killing that the decedent, John D. Stewart, Jr., was attempting to open the small pen and/or pocketknife at the time he was shot. Not only does the Petitioners' explanation for the use of deadly force fail to support their claim, but the investigatory materials produced by the Petitioner, Monongalia County Commission, reveal that the small, unopened pen and/or pocketknife was still in the decedent's pocket at the time of his killing and only popped out of his pocket when his lifeless body was turned over by the responding emergency medical provider. *Id.* Furthermore, the statements and positions taken by the Petitioners, John Doe Deputy and/or the Monongalia County Commission, during the underlying investigation of the decedent's killing with respect to the underlying events, such as John Doe Deputy's claimed position in reference to the decedent, do not align with the available evidence. *Id.*

Respondent's expert, Timothy A. Dimoff, CPP, LPI, opines that the Defendant Deputy's conduct is an improper use of deadly force in a civil situation. *(J.A._0222-0225).* Mr. Dimoff asserts that the incident and specific situation did not justify any type of deadly force. *Id.* He found that the Defendant Deputy did not meet his own department's guidelines for the use of deadly force, as the decedent showed no intention nor ability to harm the officer in a serious manner. *Id.* He posits that the Defendant Deputy escalated the situation and that, even if the decedent had a low-level warrant (which he did not), the existence of the same did not justify use of deadly force against him. *Id.* Moreover, other non-deadly means were available to the officer, especially considering that there were both distance and obstructions separating the parties. *Id.* In fact, Mr. Dimoff asserts that, even if the decedent had an open pen knife, the circumstances did not justify the shooting. *Id.* A copy of Mr. Dimoff's report was made a part of the record in this matter. *Id.*

There is no need to discuss the lengthy procedural history in this matter, as the Respondent believes that the history of the underlying procedural events is substantially accurate. However, the Respondent would note that this matter has been pending April 2, 2021, as has been the subject of waves of attack by the defense in both state and federal courts. The Respondent has not yet been provided an opportunity to conduct discovery is this matter in the almost two years since it has been pending.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The instant appeal is ripe for oral argument pursuant to **W.Va. R. App. P., Rule 20.** Pursuant to **Rule 20(a)**, "Cases suitable for Rule 20 argument include, but are not limited to: (1) cases involving issues of first impression; (2) cases involving issues of fundamental public importance; (3) cases involving constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling; and (4) cases involving inconsistencies or conflicts among the decisions of lower tribunals." The instant matter undoubtedly regards an issue of fundamental public importance. This case regards the scope of liability of a West Virginia political subdivision under West Virginia law for the deadly shooting of a man who appears to have been unarmed. Cases involving officer-involved shootings have been a hot-button issue over the past several years in jurisdictions across the country. The Circuit Court of Monongalia County's *Orders* in this matter directly impact the scope of liability of law enforcement officers at the local political subdivision level and involve, in part, matters of first impression. As such, the same should be heard by the Court at **Rule 20** oral argument.

IV. SUMMARY OF ARGUMENT

The instant case stems from an officer-involved shooting due to the decedent's possession of an unopened pen knife – a pen knife that was ultimately found unopened in the decedent's

pocket following his killing. Despite an egregious set of facts underlying the shooting, the Petitioners (and defendants hereinbelow), Monongalia County Commission d/b/a Monongalia County Sheriff's Department and John Doe Deputy, have unsuccessfully attempted multiple times to dismiss this matter on the basis of various claims of immunity at the state, federal, and appellate levels. The most recent attack came against the *Amended Complaint* and resulted in the Circuit Court's September 7, 2022 *Order from July 25, 2022 Hearing*.

The Circuit Court's *Order from July 25, 2022 Hearing* and the *Order from September 21, 2021 Hearing*, from which it flows, are largely correct insofar as they find the Petitioners are not entitled to immunity for Respondent's claims. The Circuit Court correctly held that the Petitioners were not entitled to "qualified immunity" for claims related to Mr. Stewart's killing insofar as the outrageous facts of this case reveal that their conduct was constitutionally unreasonable. **See Maston v. Wagner, 236 W. Va. 488, 781 S.E.2d 936 (2015)**. Likewise, the Circuit Court further correctly found the that the Respondent's claims for wrongful death were not barred by **Fields v. Mellinger, 851 S.E.2d 789 (W. Va. 2020)**, but properly stated a claim for wrongful death. The Circuit Court properly held that Respondent's claims for negligence and/or malicious, willful and/or reckless conduct against Petitioner, John Doe Deputy, were supported by the factual allegations in the *Amended Complaint*.

The Circuit Court's rejection of the Petitioners' argument that Count III of the *Amended Complaint* should be dismissed pursuant to **Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016)** provided a correct interpretation of law. **See Syl. Pts. 4-5, Smith v. Burdette, 211 W. Va. 477, 481, 566 S.E.2d 614, 618 (2002); Syl. Pt. 4, Beckley v. Crabtree, 189 W. Va. 94, 95, 428 S.E.2d 317, 318 (1993); and Mallamo v. Town of Rivesville, 197 W. Va. 616, 626, 477 S.E.2d 525, 535 (1996).** Moreover, the Circuit Court further correctly found that claims of

punitive damages liability against both Petitioner were properly the subject to further discovery insofar as discovery of the scope of Petitioners' liability insurance had not yet been done and insofar as the conduct of the Petitioner, John Doe Deputy, could divest him of any argument for punitive damages immunity under the ***W.Va. Governmental Tort Claims and Insurance Reform Act*** . **See W.Va. Code § 29-12A-9(a); Bender v. Glendenning, 219 W. Va. 174, 180, 632 S.E.2d 330, 336 (2006); W.Va. Code § 29-12A-3(a), (d).**

While the Circuit Court of Monongalia County, West Virginia, was ultimately correct when it repeatedly denied the Petitioners' motions to dismiss on the basis of immunity, the Circuit Court did err during this process when it held, in its *Order from September 21, 2021 Hearing,* that a direct liability action could not be maintained against the defendant Commission pursuant to **W.Va. Code § 29–12A–5(a)(5)**. In rendering this decision, the Circuit Court misconstrued the decision of the West Virginia Supreme Court of Appeals in **Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016)**, and improperly applied it beyond its narrow application to claims regarding fire protection. In doing so, the Circuit Court ignored the long history of cases where immunity for police protection under **W.Va. Code § 29–12A–5(a)(5)** was limited to only claims concerning policy-making errors. **See Syl. Pts. 4-5, Smith v. Burdette, 211 W. Va. 477, 481, 566 S.E.2d 614, 618 (2002); Syl. Pt. 4, Beckley v. Crabtree, 189 W. Va. 94, 95, 428 S.E.2d 317, 318 (1993); and Mallamo v. Town of Rivesville, 197 W. Va. 616, 626, 477 S.E.2d 525, 535 (1996).** It is from this ruling that the Respondent asserts a cross-assignment of error.

V. LAW & ARGUMENT

Respondent's Cross-Assignment of Error:

1. **The Circuit Court of Monongalia County erred when it held that the plaintiff could not pursue a claim against the Monongalia County Commission, beyond a claim for vicarious liability, insofar as it found the County to be immune under the *West Virginia Governmental Tort Claims and Insurance Reform Act,* W.Va. Code § 29–12A–**

5(a)(5), pursuant to is misapplication of Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016).

While the Circuit Court of Monongalia County, West Virginia, was ultimately correct when it repeatedly denied the Petitioners' motion to dismiss on the basis of immunity, the Circuit Court did err during this process when it held that a direct liability action could not be maintained against the defendant Commission. In rendering this decision, the Circuit Court misconstrued the decision of the West Virginia Supreme Court of Appeals in **Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016)** as having application beyond mere matters of fire protection. This is an error that should be addressed upon cross-assignment in the instant appeal, pursuant to **W.Va. R. App. P. 10(f)**.

Local police departments and Sheriff's departments that improperly utilize excessive force against members of the public should not be immunized for their conduct. **W.Va. Code § 29–12A–5(a)(5)** states that "(a) A political subdivision is immune from liability if a loss or claim results from:...(5) Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection..." The West Virginia Supreme Court of Appeals in **Syl. Pts. 4-5, Smith v. Burdette, 211 W. Va. 477, 481, 566 S.E.2d 614, 618 (2002), overruled in part by Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016)(overruled solely on issues of fire protection)**, interpreted the scope of this immunity as follows: "...the phrase 'the method of providing police, law enforcement or fire protection' contained in *W.Va.Code,* 29–12A–5(a)(5) [1986] refers to the decision-making or the planning process in developing a governmental policy, including how that policy is to be performed. To the extent that the holding of the Court is inconsistent with language in *Beckley v. Crabtree,* 189 W.Va. 94, 428 S.E.2d 317 (1993) and its progeny, the holdings in those cases are hereby modified. Furthermore, *W.Va.Code,* 29–12A–5(a)(5) [1986] does not provide immunity to a political

subdivision for the negligent acts of the political subdivision's employee performing acts in furtherance of a method of providing police, law enforcement or fire protection."

Pre-**Smith**, this Court held that "[r]esolution of the issue of whether a loss or claim occurs as a result of "'the method of providing police, law enforcement or fire protection' requires determining whether the allegedly negligent act resulted from the manner in which a formulated policy regarding such protection was implemented." **Syl. Pt. 4, Beckley v. Crabtree, 189 W. Va. 94, 95, 428 S.E.2d 317, 318 (1993), holding modified by Smith v. Burdette, 211 W. Va. 477, 566 S.E.2d 614 (2002).** In **Beckley**, this Court found that a Sheriff's department was not immune, pursuant to **W.Va. Code § 29–12A–5(a)(5)**, from a lawsuit filed by a State Trooper who was shot by a Sheriff's deputy due to the deputy's discharge of shogun at the scene of an arrest. This Court permitted the Trooper to sue the Sheriff's Department finding that the scope of immunity set forth in **W.Va. Code § 29–12A–5(a)(5)** did not bar the claim insofar as conduct of the Sheriff's Department and/or its deputy did not regard policy formulation. **See Id. at 98, 428 S.E.2d at 321**.

As the U.S. District Court for the Southern District of West Virginia recognized, "Section 29–12A–5(a)(5) is not 'so broad as to immunize a city on every aspect of negligent police and fire department operations.' *Smith,* 566 S.E.2d at 617. *Smith* explained that the statute provides immunity to law enforcement entities when claims against them are aimed at basic matters [such] as the type and number of fire trucks and police cars considered necessary for the operation of the respective departments; how many personnel might be required; how many and where police patrol cars are to operate; the placement and supply of fire hydrants; and the selection of equipment options. *Id.* (quoting *Mallamo v. Town of Rivesville,* 197 W.Va. 616, 477 S.E.2d 525, 535 (1996)). The statute simply does not contemplate immunity where a plaintiff sues based on negligent hiring

and supervision of an employee." **Woods v. Town of Danville, W.V., 712 F. Supp. 2d 502, 513–14 (S.D.W. Va. 2010).**[2]

As the Court may see, this Court has clearly found the immunity conferred by **W.Va. Code § 29–12A–5(a)(5)**, when it comes to policing matters, only to applied to acts and/or omissions of a policy decision-making nature. The reason for this appears to be that the scope of immunity is **subsection 5(a)(5)** is supposed to coextensive with principals of the "public duty" doctrine. This Court has found that the scope of immunity as contained in "...West Virginia Code § 29–12A–5(a)(5) is the codification of the common law 'public duty doctrine' as pertains to political subdivisions and is therefore subject to the "special relationship" exception..." **Bowden v. Monroe Cnty. Comm'n, 232 W. Va. 47, 52, 750 S.E.2d 263, 268 (2013).** Moreover, as this Court held in **Syl. Pt. 8, Randall v. Fairmont City Police Dept., 186 W.Va. 336, 412 S.E.2d 737 (1991):**

> *W. Va.Code,* 29–12A–5(a)(5) [1986], which provides, in relevant part, that a political subdivision is immune from tort liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection [,]" is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole. Lacking a clear expression to the contrary, that statute incorporates the common-law special duty rule and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular individual.

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[2] This Court in **Mallamo v. Town of Rivesville, 197 W. Va. 616, 626, 477 S.E.2d 525, 535 (1996)** also noted that **subsection 5(a)(5)** immunity was limited to policy-making liability stating, "[i]n the case before us, the evidence reveals that the officers acted pursuant to formulated policy when they unholstered their weapons upon observing a high-powered rifle in a bedroom of plaintiff's home. However, the discharge of Van Pelt's weapon was not the result of implementing such policy. Thus, because the injuries plaintiff sustained were not the result of the method of providing police, law enforcement or fire protection, within the meaning of *W. Va. Code,* 29–12A–5(a)(5) [1986], the Town of Rivesville would not have been immune from liability thereunder. Consequently, under *W. Va. Code,* 29–12A–4(c)(2) [1986], *supra,* the Town of Rivesville would have been liable for the negligence, if any, of its employee, Wilson.

For this reason, claims regarding the excessive use of force or the improper use of deadly force against a citizen fall outside of the scope of the statutory immunity expressed by the ***West Virginia Governmental Tort Claims and Insurance Reform Act*** as those claims do not regard the effect of police policy on the general public, but rather regard tortious conduct committed against a particular citizen.

In 2016, however, the issue of the scope of **W.Va. Code § 29–12A–5(a)(5)** came before this Court again, but only in the context of fire protection matters. **See Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016)**. The Court in **Albert** was faced with a claim by a plaintiff who alleged that the City of Wheeling Fire Department failed to extinguish a fire at their home due to rocks clogging the fire hose. The **Albert** Court held that the City was immune from those claims pursuant to **W.Va. Code § 29–12A–5(a)(5)** and overruled **Burdette** only to the extent that its holding applied to claims regarding fire protection. In fact, at **Syllabus Points 4-6**, the Court in **Albert** did not extend its holding to police conduct and expressly limited its holdings to fire protection. It is important to note that the West Virginia Supreme Court of Appeals in **Albert** had the opportunity to overrule **Burdette** in its entirety, but did not do so. In fact, since **Albert**, the West Virginia Supreme Court of Appeals appears yet to have modified the holding in **Burdette** as it applies to police action and improper use of deadly force claims.

Despite the foregoing, the Circuit Court of Monongalia County, West Virginia, erroneously extended **Albert** to matters of unlawful use of deadly force by the police, despite no expression in that case calling for such and despite there being no decision of the West Virginia Supreme Court of Appeals extending **Albert** in such a manner. Likewise, there is no decision of the West Virginia Supreme Court of Appeals finding that a local or county police force cannot be held responsible

for a wrongful death caused by excessive use of force. By extending **Albert** to provide such a result, the Court inherently interpreted **W.Va. Code § 29–12A–5(a)(5)** in a manner that was in contravention to the **W.Va. Constitution** and its protections of the decedent's rights to life and liberty.

The annals of West Virginia jurisprudence evince that civil actions against local or county police for use of excessive force are proper. **See gen., Maston v. Wagner, 236 W. Va. 488, 781 S.E.2d 936 (2015)(no immunity found for state law claims against Tyler County Sheriff's Department and State Police for excessive use of force).** The holding of the **Maston** Court implies that such claims may be properly made against both State and local law enforcement, as the plaintiff therein properly sued both the State Police and Tyler County Sheriff's Department despite **W.Va. Code § 29–12A–5(a)(5)**.

As such, the Circuit Court below committed clear error when it found that the County Commission could not be held directly liable pursuant to **Albert**, but only vicariously liable. A local police department is simply not entitled to be insulated from liability for an unconstitutional and unreasonable use of deadly force. By misconstruing **Albert**, the Circuit Court inherently held that local and county police forces in West Virginia enjoy an immunity from suit that is not enjoyed by the West Virginia State Police, Division of Natural Resources, Division of Corrections and Rehabilitation, and other law enforcement arms of the State. There is simply no public policy justification for treating State Police any different than local law enforcement.

Responses to the Petitioners' Assignments of Error:

1. **The Circuit Court did not err in finding that the Petitioners were not entitled to "qualified immunity" as the actions of the Petitioners in shooting the decedent, John D. Stewart, Jr., due to him having an unopened pen knife in his pocket, were plainly a violation of Mr. Stewart's clearly-established constitutional rights.**

The Circuit Court did not err in finding that the defense of "qualified immunity" did not apply to the defendants conduct underlying the plaintiff's use of deadly force claims. The defendants asserted below and in the instant appeal that the plaintiff has not alleged a violation of a clearly established right of which the defendants should have known. However, this is incorrect, as in cases of improper use of force or deadly force, the violation of a clearly established constitutional right may be shown by unreasonable conduct on the part of the defendants. **See Maston v. Wagner, 236 W. Va. 488, 506–07, 781 S.E.2d 936, 954–55 (2015).** The plaintiff's *Amended Complaint* alleges facts which demonstrate that the conduct of the defendants was constitutionally unreasonable.

As this Court has held, "'[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.' Syllabus Point 1, *Hutchison v. City of Huntington,* 198 W.Va. 139, 479 S.E.2d 649 (1996)." **Syl. Pt. 3, Maston v. Wagner, 236 W. Va. 488, 781 S.E.2d 936, 940–41 (2015).** "'Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.' *Bennett v. Coffman,* 178 W.Va. 500, 361 S.E.2d 465 (1987)." **Syl. Pt. 4, Id.** "'To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or

omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.' Syllabus Point 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014)." **Syl. Pt. 5, Id.**

All of that said, "'[Q]ualified immunity ... is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages.' *Hutchison*, 198 W.Va. at 148, 479 S.E.2d at 658. The test for evaluating if a public official is entitled to qualified immunity, in the absence of fraudulent, malicious or intentional wrongdoing, is this: would an objectively reasonable public official, acting from the perspective of the defendant, have reasonably believed that his or her conduct violated the plaintiff's clear statutory or constitutional rights? Stated another way: Therefore, in the absence of any willful or intentional wrongdoing, to establish whether public officials are entitled to qualified immunity, we ask whether an objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate the plaintiff's constitutional rights, in light of clearly established law and the information possessed by the defendant at the time of the allegedly wrongful conduct? *Id.*, 198 W.Va. at 149, 479 S.E.2d at 659 (footnotes omitted)." **Id. at 501, 781 S.E.2d at 949**. "Justice Cleckley, writing for the Court in *Hutchison*, suggested a two-part test that determines, first, whether the government officer violated a plaintiff's statutory or constitutional right, and if so, then second, whether that right was clearly established in light of the specific context of the case at the time of the events in question.

As Justice Cleckley stated, 'When broken down, it can be said that we follow a two-part test: (1) does the alleged conduct set out a constitutional or statutory violation, and (2) were the constitutional standards clearly established at the time in question?' *Id.,* 198 W.Va. at 149, 479 S.E.2d at 659 (footnotes omitted). Several years after *Hutchison,* the United States Supreme Court adopted a similar two-part approach to qualified immunity: A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? ..." **Id.**

In the context of establishing a violation of clearly-establish statutory or constitutional rights in excessive force cases, this Court has instructed that legal specificity is not required for demonstration of a clear constitutional violation. Instead, the standard is one of constitutional reasonableness, which is dependent upon the facts of the case at bar. As the Court reasoned in **Maston v. Wagner, 236 W. Va. 488, 506–07, 781 S.E.2d 936, 954–55 (2015)(emphasis added).**

> In the context of excessive force cases, the constitutional standard—reasonableness—is always an exceptionally fact-specific inquiry. Hence, there are two ways to show a government official's actions are unreasonable. "A violation [of a constitutional right] may be clearly established if the violation is so obvious that a reasonable state actor would know that what they are doing violates the Constitution, *or* if a closely analogous case establishes that the conduct is unconstitutional." *Siebert v. Severino,* 256 F.3d 648, 654–55 (7th Cir.2001) (emphasis added). **When the conduct of a government official " 'is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established."** *Mendoza v. Block,* 27 F.3d 1357, 1361 (9th Cir.1994) (quoting *Casteel v. Pieschek,* 3 F.3d 1050, 1053 (7th Cir.1993)). "If qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." *Mattos v. Agarano,* 661 F.3d 433, 442 (9th Cir.2011). "Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle v. Rutherford,* 272 F.3d 1272, 1286 (9th Cir.2001). *See also, Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (rejecting the notion that officer liability cannot exist "unless the very action in question has previously been held unlawful").

> We perceive nothing novel about the facts of the instant case, and the United States Supreme Court has made "clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). "That the level of force used must be justified in light of 'the severity of the crime at issue,' the suspect's flight risk, and the immediacy of the risk posed by the suspect to the safety of officers and others was the clearly established law on the night of the incident." *Shekleton v. Eichenberger,* 677 F.3d 361, 367 (8th Cir.2012) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865).
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> 4849 Trial courts must, of course, allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396–97, 109 S.Ct. 1865. But, of course, "a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle,* 272 F.3d at 1281.

The Circuit Court correctly held that the facts of the *Amended Complaint* demonstrated unreasonable and excessive use of force on the part of the Petitioners which violated clearly established constitutional rights of the decedent. The allegations of *Amended Complaint* set forth a scenario where a Deputy Sheriff used unlawful deadly force to seize the decedent in violation of his clearly established state and federal constitutional rights. The decedent's execution came during the Deputy's attendance to a civil, not a criminal matter. (*J.A._0108).* The Deputy had no justifiable reason or cause to seize or arrest the decedent; but, regardless, he escalated the situation with him. The Deputy chased the decedent instead of deescalating the situation. (*J.A._0110-0111, 0222-0225).* The decedent, who was not under arrest or being taken into custody, was retreating back into his home in response to the officer's aggressions. *Id.* The Deputy claimed that he was the decedent had an unopened, small pen knife on his person, as most the county's rural residents do. (*J.A._0111).* He killed the decedent from a distance of 15 to 22 feet away with his firearm based upon an unjustifiable claim that he was in danger as a result of an unopened pen knife. (*J.A._0111, 0222-0225).* Likewise, the Deputy's conduct violated the use of force policies of the Sheriff's Department and the same is supported by the Respondent's expert, and the Sheriff's

Department purports to train is deputies on the legal requirements for the use deadly force. *(J.A._0222-0225, 0235-0258).*

The Deputy's rendition of events not only failed to prove a justification for the use of deadly force, but the veracity of his rendition is also very suspect. The location of where the shell casings were found did not line up with the distance and/or location where the officer suggested the shooting occurred. *(J.A._0222-0225).* Moreover, the allegations of the plaintiff's *Amended Complaint* assert that at least one witness at the scene, an emergency medical personnel, stated she observed the unopened pen knife fall out of the decedent's jean pocket when she rolled his dead body over. *(J.A._0113).* This inferred that the Deputy's assertion, that he was under threat due to a pen knife, was untrue and that he was only conforming his story to items found at the scene of the killing. In addition to his inaccuracy regarding the pen knife, the Deputy's claims are further called into doubt insofar as he either spoliated evidence of body cam footage from the scene of the shooting or did not preserve or capture bodycam footage of these events in accordance with policy. *(J.A._0112).* The deputy's failure to keep or capture body cam footage of the subject incident renders his claims of a justified shooting highly questionable. *Id.*

As this Court may see, the Circuit Court did not err by finding that the defendants were not entitled to "qualified immunity" under the specific factual circumstances of the case. Any reasonable officer would have known that the unlawful and unjustified killing of decedent under the circumstances was constitutionally improper. Moreover, the deputy's attempts to fabricate the decedent's use of a weapon, his inconsistent statements regarding the shooting, and the absent body cam footage may serve as further evidence of the subjective understanding by the deputy of the constitutional need for a proper justification of such a use of force. Accordingly, the Circuit

Court's *Orders* regarding the defendants' *Motions to Dismss* below should be upheld to the extent that it found the defense of "qualified immunity" to be inapplicable.

2. The Circuit Court did not err in failing to dismiss Count III (Vicarious liability as against defendant Commission) of the *Amended Complaint*, as asserted by Petitioners, as the Respondent's claims did not trigger immunity protection under the *West Virginia Governmental Tort Claims and Insurance Reform Act*, W.Va. Code § 29-12A-5, as the defendants are not entitled to immunity pursuant to the *Act*.

The Circuit Court did not err when it refused to dismiss the Respondent's claims of vicarious liability against it in Count III of the *Amended Complaint.* **See W. Va. Code § 29-12A-5 (c) ("The immunity conferred upon an employee by subsection (b) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee.").** The Petitioners assert that the Circuit Court misconstrued the decision of the West Virginia Supreme Court of Appeals in **Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016)** when it failed to dismiss Count III. The Respondent asserts that the Circuit Court misapplied that case in its *Order from September 21, 2021 Hearing* when it dismissed the Respondent's direct action against the Commission. As the Court may see, both Petitioners and Respondent are aggrieved over the Circuit Courts application of **Albert** for different reasons. *See Respondent's Cross-Assignment of Error.*

Local police departments and Sheriff's departments that improperly utilize excessive force against members of the public should not immunized for their conduct. **W.Va. Code § 29–12A–5(a)(5)** states that "(a) A political subdivision is immune from liability if a loss or claim results from:...(5) Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection..." The West Virginia Supreme Court of Appeals in **Smith v. Burdette, 211 W. Va. 477, 481, 566 S.E.2d 614, 618 (2002), overruled in part by Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628**

(2016)(overruled solely on issues of fire protection), interpreted the scope of this immunity as follows: "...the phrase 'the method of providing police, law enforcement or fire protection' contained in *W.Va.Code,* 29–12A–5(a)(5) [1986] refers to the decision-making or the planning process in developing a governmental policy, including how that policy is to be performed. To the extent that the holding of the Court is inconsistent with language in *Beckley v. Crabtree,* 189 W.Va. 94, 428 S.E.2d 317 (1993) and its progeny, the holdings in those cases are hereby modified. Furthermore, *W.Va.Code,* 29–12A–5(a)(5) [1986] does not provide immunity to a political subdivision for the negligent acts of the political subdivision's employee performing acts in furtherance of a method of providing police, law enforcement or fire protection." The **Albert** Court held that the City was immune from those claims pursuant to **W.Va. Code § 29–12A–5(a)(5)** and overruled **Burdette**, but to the only to the extent that its holding applied to claims regarding fire protection. It should not be construed to apply to cases involving excessive use of force by law enforcement. **See gen., Maston v. Wagner, 236 W. Va. 488, 781 S.E.2d 936 (2015).**

Accordingly, for those reasons set forth in Respondent's *Cross-Assignment of Error*, the Petitioners' arguments in regard to Count III are incorrect. The Respondent incorporates the arguments set forth in *Respondent's Cross-Assignment of Error* above as if fully set forth herein. Extending **Albert** to provide the result sought by the Petitioners would be to interpret the scope of **W.Va. Code § 29–12A–5(a)(5)** in a manner that is in contravention to the **W.Va. Constitution** and its protections of the decedent's rights to life and liberty.

3. The Circuit Court did not err in failing to dismiss Count II of the *Amended Complaint* as against the Deputy as the *Amended Complaint* contained more than sufficient facts to establish that the Deputy acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The Circuit Court did not err in failing to dismiss Count II of the *Amended Complaint*. The Circuit Court was correct that Deputy could be held liable for negligently causing the wrongful

death of the decedent. The Circuit Court was, likewise, correct that the Deputy could be held liable for malice, bad faith, and/or willful and/or reckless conduct. As such, the Petitioners' underlying *Motion* was rightfully denied.

First and foremost, the Deputy may be held liable for his negligence pursuant to the ***West Virginia Governmental Tort Claims and Insurance Reform Act*, W.Va. Code § 29-12A-1, *et seq.*** In support of that contention, the Respondent incorporates by reference, as is fully set forth herein, her positions regarding the applicability of **W.Va. Code § 29–12A–5(a)(5)** set forth above in sections one (1) and three (3) of the Respondent's *Law & Argument* section in response to defendants' assignments of error "B."

Second, the Circuit Court was not in error because the facts as alleged in Respondent's *Amended Complaint* clearly set forth facts suggesting that the Deputy acted maliciously, in bad faith, and/or willfully and/or recklessly. Pursuant to **W.Va. Code § 29-12A-5(b)**, "An employee of a political subdivision is immune from liability unless one of the following applies:(1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities; (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) Liability is expressly imposed upon the employee by a provision of this code." No matter how the Petitioners attempt to spin it, the facts as alleged in the *Amended Complaint* reveal factual allegations that may result in a waiver of immunity by the Deputy under **subsection 5(b)**.

The Deputy in this case claims to have shot a man for possessing a pen knife in that he admits was not opened. The Deputy also alleged that he was 7 feet apart from the decedent at the time of the shooting. *(J.A._0224)*. That is, in essence, the "justification" for his use of deadly force against the decedent.

The facts, as alleged in the *Amended Complaint*, tell a much different story. For example, the unopened pen knife at issue that the Defendant Deputy alleges was being wielded was still in the decedent's pocket at the time he was shot and killed. *(J.A._0113).* In fact, an emergency medical worker observed the unopened pen knife fall out of the decedent's pocket when the decedent's lifeless body was rolled over at the scene. *Id.* Despite his claim that the parties were 7 feet apart, the spent casings from the Deputy's firearm evince that the Deputy was *at least* 15-22 feet away at the time and that there were obstructions, such as porch railings and steps, further separating the parties. *(J.A._0111, 0222-0225).* Moreover, there is no allegation that the decedent charged at the Deputy with an open knife, or that he posed any threat to the officer.[3] Despite the fact that the Deputy was wearing a body cam at the time of the incident, there exists no body cam footage of the incident. *(J.A._0112).* Draw whatever conclusion from that as you will, but it is a fair inference that the footage was either spoliated by the Deputy or that the Deputy intentionally refused to turn on his body cam as he escalated the situation. The non-existent body cam footage draws even more doubt into the Deputy's explanation of the events leading up to his shooting of a man with an unopened pen knife in his pocket, which already contain material inconsistencies.

[3] **Morin v. State, No. 14-17-00080-CR, 2018 WL 3625290, at *2 (Tex. App. July 31, 2018)("Under the circumstances described by the eyewitness—that the decedent had shown the knife in a non-threatening manner and then put it away—no ordinary and prudent person in appellant's position could have believed that deadly force was immediately necessary to protect himself from the decedent's use or attempted use of unlawful deadly force.); Studdard v. Shelby Cnty., Tennessee, 934 F.3d 478, 483 (6th Cir. 2019))"There is a world of difference between a knife-wielding suspect who runs at officers and one who doesn't."); Est. of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008)("In assessing the degree of threat facing officers, then, we consider a number of non-exclusive factors. These include (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect. *See, e.g., Walker v. City of Orem,* 451 F.3d 1139, 1159 (10th Cir.2006); *Jiron,* 392 F.3d at 414–15; *Zuchel v. Spinharney,* 890 F.2d 273, 274 (10th Cir.1989).").**

Respondent's expert, Timothy A. Dimoff, CPP, LPI, opines that the Defendant Deputy's conduct is an improper use of deadly force in a civil situation. Mr. Dimoff asserts that the incident and specific situation did not justify any type of deadly force. (*J.A._ 0222-0225).* He found that the Defendant Deputy did not meet his own department's guidelines for the use of deadly force, as the decedent showed no intention nor ability to harm the officer in a serious manner. *See Id.* He posits that the Defendant Deputy escalated the situation and that, even if the decedent had a low-level warrant (which he did not), the existence of the same did not justify use of deadly force against him. *Id.* Moreover, other non-deadly means were available to the officer, especially considering that there were both distance and obstructions separating the parties. *Id.* In fact, Mr. Dimoff asserts that, even if the decedent had an open pen knife, the circumstances did not justify the shooting. *Id.*

The defense suggests that such a shooting is justified and that the decedent's daughter should not have a cause of action under State law to seek recourse for the same. However, the facts as alleged demonstrate an unjustifiable use of deadly force against a man with only an unopened pen knife in his pocket. The officer provided an explanation of events which is materially inconsistent with the evidence, evincing a guilty conscious. As such, the Circuit Court properly held that the Defendant Deputy those facts may serve as the basis for a negligence claim against the deputy. Likewise, those facts may easily rise to the level of malicious, bad faith, and/or willful and/or reckless conduct which result in a waiver of potential statutory immunity to the Defendant Deputy in the instant matter. **See W.Va. Code § 29-12A-5(b).** Accordingly, the Circuit Court's *Orders* regarding the defendants' *Motions to Dismss* below should be upheld to the extent that it found Count II to present a viable claim against the Defendant Deputy.

4. The Circuit Court did not err in failing to dismiss Count I of the *Amended Complaint* as against the Defendant Deputy as the *Amended Complaint* properly sets forth a claim for wrongful death.

The defendant's *Motion to Dismiss* Count I must be denied as it misconstrues the plain language of the plaintiff's *Amended Complaint* and further misapplies the decision in **Fields v. Mellinger, 851 S.E.2d 789 (W. Va. 2020)**.

The plaintiff at Count I of the *Amended Complaint* set forth a cause of action pursuant to the ***West Virginia Wrongful Death Act*, W.Va. Code, § 55-7-1, *et seq.*** The Act commands that

> Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after the death of the injured party.
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> **W. Va. Code § 55-7-5.**

There is no question that a plaintiff under these circumstances has a private right of action for wrongful death action against a governmental entity for excessive use or unnecessary use of force. There is likewise no question that the plaintiff invoked the ***Wrongful Death Act*** as the predicate for her cause of action in the *Amended Complaint*.

The Petitioners have attempted to assert that Count I of the *Amended Complaint* is brought solely pursuant to **Art. III, Sec. 6 of the West Virginia Constitution**, when the allegations of the *Amended Complaint* expressly state otherwise. The defense has done so in an effort to apply an inapplicable case to the instant matter in the hopes that the Court will be taken out of context. The

Court stated in **Syl. Pt. 3, Fields v. Mellinger, 851 S.E.2d 789 (W. Va. 2020)**, "West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution." In **Fields**, the plaintiff had asserted a one of his claims based *solely* upon the violation of this provision. **Fields** did not regard an action brought pursuant to the ***Wrongful Death Act***. The plaintiff in **Fields** brought a state law cause of action premised solely upon an unlawful search or seizure and not pursuant to any other lawful or recognized cause of action, but that is not the situation in the instant case.

The Respondent's *Amended Complaint* invokes a wrongful death action under the **West Virginia Code**. Her reference to the West Virginia and U.S. Constitution is an allegation of violation of a clearly established law or right necessary for overcoming the potential for a "qualified immunity" defense. This was asserted numerous times hereinbefore. As the Court in **Syl. Pt. 5, Maston v. Wagner, 236 W. Va. 488, 781 S.E.2d 936, 940 (2015)**

> "To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability." Syllabus Point 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014).

The Court in **Maston** was attempting to assess the "qualified immunity" defense to an excessive use of force situation. At issue was whether the police officers' actions violated constitutional principles regard unlawful search, seizure, and arrest of a person. Ultimately, the Court found those actions to be in violation of those constitutional principles and, likewise, found the "qualified immunity" defense not to apply insofar as the officer's actions violated clearly established constitutional rights regarding unlawful search and seizure. However, most importantly, it should be noted that the Court in **Maston** implicitly recognized that improper and

excessive use of force may provide a victim with cause of action under West Virginia State law against both State and local law enforcement entities. Likewise, the Court in **Fields at 136, 851 S.E.2d at 799** expressly suggested that State law claims sounding in battery may properly maintained in an excessive force case. The Respondent's *Amended Complaint* provides sufficient factual allegations to establish a cause of action under **Maston** and/or a wrongful death claim caused by a battery[4] as contemplated by **Fields**.[5] Accordingly, the Circuit Court's *Orders* regarding the defendants' *Motions to Dismss* below should be upheld to the extent that it found Count I to present a viable claim against the Defendant Deputy.

5. The Circuit Court did not err when it denied Petitioners' *Motion to Dismiss* the Respondent's claim for punitive damages as ordering discovery on the same was entirely proper.

The Circuit Court did not err in denying Petitioners' *Motion to Dismiss* with regard to the issue of punitive damages as there are circumstances where punitive damages may be proper

[4] Not only do the facts as alleged state a civil or criminal battery, but the same also sound in terms of a malicious wounding with a firearm. Pursuant to **W.Va. Code § 61-2-9(a)**, "If any person maliciously shoots, stabs, cuts or wounds any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill, he or she, except where it is otherwise provided, is guilty of a felony and, upon conviction thereof, shall be punished by confinement in a state correctional facility not less than two nor more than ten years. If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and, upon conviction thereof, shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding $500."

[5] It matters not that the Respondent's claim at *Count I* is pled as a claim for wrongful death. The style of the cause of action is of no consequence. It is well-settled that "[w]hen a Rule 12(b)(6) motion is made, the pleading party has no burden of proof. Rather, the burden is upon the moving party to prove that no legally cognizable claim for relief exists. *See* 5B Charles A. Wright, Arthur R. Miller, Federal Practice and Procedure § 1357 (3rd ed. 2020)[.]". **Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia, 244 W. Va. 508, 520, 854 S.E.2d 870, 882 (2020)**. "Stated differently, 'a complaint is sufficient against a motion to dismiss under Rule 12(b)(6), if it appears from the complaint that the plaintiff may be entitled to *any form of relief*, even though the particular relief he has demanded and the theory on which he seems to rely are not appropriate.' 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 (3rd Ed. 2020) (emphasis added)."**Id. at 522, 854 S.E.2d at 884.** Thus, the title and style of a cause of action is not outcome determinative of a **Rule 12(b)(6)** motion, but whether any cause of action may fit the allegations of the pleading.

against both Defendant Deputy and/or the Defendant Commission. The Respondent does not dispute that the ***W.Va. Governmental Tort Claims and Insurance Reform Act,*** **W.Va. Code § 29-12a-7(a)** generally bars punitive damages claims against political subdivisions and their employees. However, that rule is not without exceptions and discovery could reveal the application of the same. As such, denial of the Petitioners' *Motion* was warranted.

Punitive Damages Claims Against the Defendant Commission

The Circuit Court's ruling as against the Defendant Commission was appropriate because discovery on the issue of insurance coverage has not yet been completed below. Any argument regarding immunity presented by the defense is procedurally premature until and unless discovery is provided on the existence and scope of insurance coverage. Pursuant to **W.Va. Code § 29-12A-9(a)**, "If a policy or contract of liability insurance covering a political subdivision or its employees is applicable, the terms of the policy govern the rights and obligations of the political subdivision and the insurer with respect to the investigation, settlement, payment and defense of suits against the political subdivision, or its employees, covered by the policy." Moreover, as the Court in **Bender v. Glendenning, 219 W. Va. 174, 180, 632 S.E.2d 330, 336 (2006)** found, "…[i]f the terms of the applicable insurance coverage and contractual exceptions thereto acquired under W. Va.Code § 29–12–5 *expressly* grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the parties to any suit should have the benefit of the terms of the insurance contract. Syl. Pt. 5, *Parkulo v. West Virginia Bd. Of Probation & Parole,* 199 W.Va. 161, 483 S.E.2d 507 (1996) (emphasis in original)." The **Bender** Court expanded the **Parkulo** principal, applicable to claims against the State, to claims against political subdivisions invoking the application of the ***W.Va. Governmental Tort Claims and Insurance Reform Act.*** **See Id.** As the Court may see, while the

Act may provide immunity for punitive damages claims, the same can be waived by the existence of insurance coverage for those damages.[6] As such, denial of the Petitioners' *Motion* was proper pending discovery on the scope and applicability of liability insurance coverage to any claimed immunities.

Punitive Damages Claims Against the Defendant Deputy

The Circuit Court further properly denied the Petitioners' *Motion* as it applied to the Defendant Deputy. Discovery on the issue of insurance coverage should be provided on the same for those same reasons set forth in regard to punitive damages claims against the Defendant Commission. However, in addition to the same, discovery was also warranted into conduct of the Defendant Deputy and how that the same may remove him from the protections of the ***Act***.

Pursuant to **W.Va. Code § 29-12A-5(b)**, "An employee of a political subdivision is immune from liability unless one of the following applies:(1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities; (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) Liability is expressly imposed upon the employee by a provision of this code." Moreover, the ***Act*** defines "employee" and "scope of employment" as follows:

> (a) "Employee" means an officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is authorized to act and is acting within the scope of his or her employment for a political subdivision. "Employee" includes any elected or appointed official of a political subdivision. "Employee" does not include an independent contractor of a political subdivision.
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> ....
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> (d) "Scope of employment" means performance by an employee acting in good faith within the duties of his or her office or employment or tasks lawfully assigned by a competent authority but does not include corruption or fraud.

[6] Technically, this is an argument against every immunity claim asserted by the Petitioners. Discovery on the scope and extent of insurance coverage has not been completed. As such, even if a given immunity did apply, the terms of the applicable policy of insurance could waive the immunity and provide the Respondent with an avenue of relief. As such, a decision on any issue of immunity is premature until insurance discovery is had.

See W.Va. Code § 29-12A-3(a), (d).

Based upon the foregoing definitions and standards, discovery was warranted before a determination as to the Defendant Deputy's liability for punitive damages can be decided. If the Deputy were to be found acting outside the scope of his employment, the Deputy would arguably fall outside the scope of the protections of the ***Act*** since he would not meet the definitions of "employee" or "scope of employment" in the ***Act***. The Circuit Court recognized the nature of the serious allegations against the Deputy and determined that a ruling on the propriety of punitive damages should be delayed until after discovery as a result. This holding was entirely appropriate in light of the foregoing.[7]

Accordingly, the Circuit Court's *Orders* regarding the defendants' *Motions to Dismss* below should be upheld to the extent that it found the issue of punitive damages to be unripe until further discovery was provided.

IV. CONCLUSION

The Circuit Court of Monongalia County (J. Gaujot) was largely correct when it denied the Petitioners' underlying *Motions to Dismiss*. The facts of this case clearly present a fact pattern regarding an improper use of deadly force that should be actionable under State law. However, the Circuit Court failed to properly apply **Smith v. Burdette, 211 W. Va. 477, 481, 566 S.E.2d**

[7] It should be noted that Respondent raised the issue below that the immunities and protections of the ***W.Va. Governmental Tort Claims and Insurance Reform Act*** may not be applicable to a police shooting case. At **W.Va. Code § 29–12A–18(e)**, the ***Act*** states that it "does not apply to, and shall not be construed to apply to, the following: Civil claims based upon alleged violations of the constitution or statutes of the United States except that the provisions of section eleven of this article shall apply to such claims or related civil actions." The Respondent admittedly does not present a federal claim. However, the Respondent posted below that, if the Petitioners' conduct is constitutionally unreasonable under a "qualified immunity" analysis, this should be enough of violation of the federal constitution to permit inapplicability of the ***Act,*** including its general bar on punitive damages. The scope and extent of the application of **subsection 18(e)** has never been addressed by this Court.

614, 618 (2002) and **Albert v. City of Wheeling, 238 W. Va. 129, 792 S.E.2d 628 (2016)** to the facts of this case. Accordingly, the Respondent respectfully requests that the *Orders* of this Court regarding be upheld, with the exception of the Circuit Court's misapplication of the foregoing cases, and that this matter be remanded to the Court for further proceedings so that the Respondent can finally begin discovery in this matter and obtain justice for her father's unlawful execution.

Respectfully Submitted,

AMANDA F. STEWART, Individually and/or in Her capacity as Administratrix of the Estate of John D. Stewart, Jr., Petitioner,

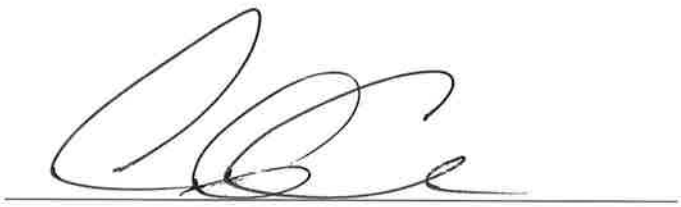
BY: _____

John R. Angotti, Esquire (W.Va. Bar #5068)
David J. Straface, Esquire (W.Va. Bar #3634)
Chad C. Groome, Esquire (W.Va. Bar #9810)
Angotti & Straface, L.C.
274 Spruce Street
Morgantown, WV 26505
(304) 292-4381 – P
(304) 292-7775 – F
johnangotti@angottistrafacelaw.com
djstraface@angottistrafacelaw.com
chadgroome@angottistrafacelaw.com
Of Counsel for Respondent, Amanda Stewart

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing **Respondent's Brief and Cross-Assignment of Error** was served upon all counsel of records by electronic filing this 2nd day of January, 2023 to the following:

Tiffany R. Durst, Esquire
Nathaniel D. Griffith, Esquire
PULLIN FOWLER FLANAGAN BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508
Of Counsel for Petitioners



Of Counsel for Respondent